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**IN THE  
COURT OF APPEALS OF INDIANA**

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PRESTON HARRIS,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 45A04-0607-PC-384
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Clarence D. Murray, Judge  
Cause No. 45G02-9210-CF-270

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**February 19, 2007**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**MATHIAS, Judge**

Preston Harris (“Harris”) was convicted in Lake Superior Court of murder and sentenced to serve thirty years. He subsequently filed a petition for post-conviction relief that was denied. He appeals and argues that he was denied effective assistance of trial counsel due to counsel’s failure to call alibi and defense witnesses on his behalf. Concluding that Harris has failed to demonstrate that counsel’s performance fell below an objective standard of reasonableness, we affirm the post-conviction court.

### **Facts and Procedural History**

In 1993, Harris was convicted of murder and sentenced to serve thirty years in the Department of Correction. Harris belatedly appealed his conviction, which was affirmed. Facts pertinent to this appeal are found in our court’s resolution of Harris’s direct appeal.

On September 26, 1992, Arlisa Johnson went to Lee’s Chicken Shack with a friend. She waited in the passenger seat of the cab of her friend’s semi as the friend went inside to get some food. The vehicle was parked across the street from the chicken restaurant, on the street running alongside Terral’s Liquor Store.

As Johnson waited in the vehicle she observed two men, whom she knew as Sneaky Pete (Steven Turner) and Warren, arguing outside of Terral’s. She then saw a vehicle pull up. Harris exited the driver’s side of the vehicle. Johnson heard Harris tell Turner: “[Y]ou not to F with my brother.” She then saw Harris shoot Turner several times. Harris then drove away.

When police arrived they found Turner lying on the ground, bleeding, about a block away from the scene of the shooting. Turner died at the hospital a few days later as a result of the gunshot wounds.

At trial, Mary Evanovich testified that, about one week after the shooting, Harris confessed to her that he had shot Turner. Evanovich testified that Harris told her he had previously been in a gunfight with Turner because of a dispute over some drugs, and that the man Harris shot at Terral’s was the same man from the drug dispute.

Harris v. State, No. 45A05-9604-CR-140, Slip op. at 2 (Ind. Ct. App. March 20, 1997)

(record citation omitted).

On November 22, 2000, Harris filed a pro se petition for post-conviction relief. The petition was later amended by counsel on July 2, 2004. The amended petition alleged in pertinent part that Harris's trial counsel was ineffective for failing to subpoena Harris's alibi witness and other individuals who witnessed the murder. Hearings were held on Harris's petition on September 30, 2003, March 2, 2005, and April 18, 2005.

The post-conviction court issued findings of fact and conclusions of law on October 6, 2005. The post-conviction court found in pertinent part:

13. The petitioner alleges numerous failings on the part of trial counsel. Among the most serious, is the claim that counsel failed to present defense witnesses to substantiate petitioner's alibi defense. As previously noted, trial counsel does not recall the case despite rather in depth questioning by post-conviction counsel. Our only insight into the strategies of counsel comes from the testimony of the petitioner in these post-conviction proceedings. During the trial testimony of Mary Evanovich, a recess was taken during which Harris told counsel that he wanted his witnesses to testify. Counsel, having heard the testimony of Arlisa Johnson and the majority of the substantive testimony of Mary Evanovich, responded that the case was beat; that they did not need any witnesses. We consider this statement in light of the evidence before us: the trial testimony of the State's witnesses and the testimony and exhibits presented at the hearing on the petition for post-conviction relief, both of which represent the information counsel would have known prior to resting his case at trial.

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16. In considering whether there could have been any possible strategy reason for calling no witnesses, whether the decision fell below prevailing professional norms, and whether the decision prejudiced the petitioner, we conclude as follows: Counsel possessed a great deal of ammunition with which to impeach the accuracy and/or honesty of the testimony of Arlisa Johnson and Mary Evanovich. The defense witnesses, via their statements to the police, testimony before the grand jury, and deposition . . . armed the State with a great deal of ammunition with which to impeach the accuracy and honesty of their testimony. For example, as the previously discussed review of their testimony reveals, all of the defense witnesses had personal relationships with Harris that were fodder for bias: Downer sold drugs for Harris and therefore depended on Harris for his livelihood, Robinson was pregnant with Harris' child and continued to be romantically involved with him at the time of the trial, the rest were friends. These witnesses gave

very different descriptions of what the shooter looked like and even how the shooting occurred. It would not have been unreasonable therefore, for any attorney, weighing the risks and benefits of presenting impeachable testimony against the risks and benefits of impeaching testimony that must overcome proof beyond a reasonable doubt, to opt to put the State to its proof. We conclude that resting the defense case without presenting the witnesses available to the defense in this case did not fall below prevailing professional norms.

Appellant's App. pp. 214-15. The post-conviction court concluded that Harris's trial counsel was not ineffective and denied his petition for post-conviction relief. Harris now appeals. Additional facts will be provided as necessary.

### **Standard of Review**

Post-conviction proceedings are not "super appeals" through which convicted persons can raise issues they failed to raise at trial or on direct appeal. McCary v. State, 761 N.E.2d 389, 391 (Ind. 2002). Rather, post-conviction proceedings afford petitioners a limited opportunity to raise issues that were unavailable or unknown at trial and on direct appeal.<sup>1</sup> Davidson v. State, 763 N.E.2d 441, 443 (Ind. 2002). The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5) (2006); Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Fisher, 810 N.E.2d at 679. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id.

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<sup>1</sup> A petition for post-conviction relief is the proper avenue for prisoners to bring claims for credit time. See Wilson v. State, 799 N.E.2d 51, 53 n.3 (Ind. Ct. App. 2003).

The post-conviction court entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6) (2006). “A post-conviction court’s findings and judgment will be reversed only upon a showing of clear error – ‘that which leaves us with a definite and firm conviction that a mistake has been made.’” Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (quoting State v. Moore, 678 N.E.2d 1258, 1261 (Ind. 1997)). Although we accept findings of fact unless they are clearly erroneous, we give conclusions of law no deference. Fisher, 810 N.E.2d at 679.

### **Discussion and Decision**

Harris claims that his trial counsel was ineffective for failing to present any witnesses in his defense including an alibi witness and eyewitnesses to the murder who would have testified that Harris did not shoot the victim.

Claims of ineffective assistance of trial counsel are generally reviewed under the two-part test announced in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, a claimant must demonstrate that counsel’s performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Prejudice occurs when the defendant demonstrates that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” A reasonable probability arises when there is a “probability sufficient to undermine confidence in the outcome.”

Appellate review of the post-conviction court’s decision is narrow. We give great deference to the post-conviction court and reverse that court’s decision only when “the evidence as a whole leads unerringly and unmistakably to a decision opposite that reached by the postconviction court.”

Although the two parts of the Strickland test are separate inquiries, a claim may be disposed of on either prong. Strickland declared that the “object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed.”

Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (internal citations omitted).

Furthermore, trial counsel's performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption. Blanchard v. State, 802 N.E.2d 14, 34 (Ind. Ct. App. 2004) (citation omitted). Consequently, isolated poor strategy or bad tactics do not necessarily amount to ineffective assistance of counsel unless, taken as a whole, the defense was inadequate. Id. (citing Brown v. State, 698 N.E.2d 1132, 1139 (Ind. 1998)). We "will not lightly speculate as to what may or may not have been an advantageous trial strategy as counsel should be given deference in choosing a trial strategy which, at the time and under the circumstances, seems best." Whitener v. State, 696 N.E.2d 40, 42 (Ind. 1998).

A decision regarding what witnesses to call is generally a matter of trial strategy that appellate courts will not second-guess. Brown v. State, 691 N.E.2d 438, 447 (Ind.1998); see also Wrinkles v. State, 749 N.E.2d 1179, 1200 (Ind. 2001) (The decision of which witnesses to call is "the epitome of a strategic decision.") (citation omitted). However, "a failure to call a useful witness can constitute deficient performance[.]" Id. (citing Clark v. State, 561 N.E.2d 759, 763-64 (Ind. 1990)).

Harris contends that trial counsel's failure to call his alibi witness and other eyewitnesses to the murder constitutes deficient performance. Specifically, he contends

[t]he calling of at least some of these witnesses was critical to Harris' defense. The testimony would have been relevant and probative to the defense because it would have cast serious doubt on Harris' guilt. This was especially important because the State's witnesses were subject to impeachment and their testimony was suspect.

Br. of Appellant at 6. Moreover, Harris notes that his trial counsel was aware that there were witnesses who would have testified that Harris did not shoot the victim. At the

post-conviction hearing, trial counsel could not give any reason why he failed to call these witnesses because he had no independent recollection of Harris's case.

Several witnesses testified at the grand jury proceedings that Harris did not shoot the victim. Despite this testimony, the grand jury indicted Harris and he was charged with murder. Harris argues that his trial counsel should have called at least some of these witnesses to testify at trial. As the State notes in its brief, the witnesses who testified before the grand jury gave inconsistent descriptions of the individual who shot the victim and/or the witnesses' description of the shooter were inconsistent with the descriptions given to the police.<sup>2</sup> Given that the grand jury apparently did not find these witnesses to be credible, we cannot conclude that Harris's trial counsel was ineffective for failing to call them to testify at Harris's trial.

Harris's trial counsel did file a notice of alibi stating that Harris was with Crystal Robinson ("Robinson") at the time the murder was committed. Ex. Vol., Petitioner's Ex. 1. However, Robinson was not called as a witness at his trial. Robinson's deposition, taken by the State, was entered as an exhibit at the post-conviction hearing. Ex. Vol., Petitioner's Ex. 2. In the deposition, Robinson stated that on the day of the murder, Harris came over to her house between 2:00 and 3:00 p.m. After "riding around" for

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<sup>2</sup> For example, Rodney Robinson testified that the shooter was approximately five feet nine inches tall and 160 pounds with slicked back hair, wearing jeans and a shirt or jacket. Ex. Vol., Petitioner's Ex. 9. In contrast, James Woods testified that the shooter weighed slightly more than his own weight of 250 pounds. Ex. Vol., Petitioner's Ex. 12. Christopher Downer testified that the shooter may have been wearing a sweat suit, but this testimony was inconsistent with his statement to the police that the shooter was wearing a blue jean outfit with brown leather on the shoulders and a Malcolm X hat. Ex. Vol., Petitioner's Ex. 11. Howard Jackson changed his testimony before the grand jury initially describing the shooter as five feet five or six inches tall, and later stating that the shooter was approximately six feet tall. Ex. Vol., Petitioner's Ex. 10. Paul McDonald described the shooter as a littler shorter than six feet tall with long curly or stringy hair and stated he was wearing a long, black coat. Ex. Vol., Petitioner's Ex. 7. All of these witnesses were acquaintances or friends of Harris's, and Downer also testified that he no longer sold drugs for Harris.

most of the day, Robinson testified that she and Harris arrived at Harris's house between 9:30 and 10:00 p.m. Id. She and Harris went to bed for "a couple hours," then around 1:00 a.m., they got up and started to clean Harris's house. Approximately twenty minutes later, Robinson stated that she heard shots and said "[s]omebody's shooting out at Terral's[.]"<sup>3</sup> Id. Shortly after Robinson heard the shots, Harris's brother arrived and told Harris and Robinson that "the dude that carries a big stick, he just got shot, got killed over at Terral's." Id. Robinson stated that she and Harris then went to Terral's to "see what had happened," but by the time they arrived, the police had already cleared the crime scene. Id.

The State concedes that Robinson's testimony was consistent. However, the State argues that given her personal relationship with Harris and the fact that she was pregnant with his child, "it may have been a good strategic decision on trial counsel's part not to call her because of her obvious motive to help" Harris. Br. of Appellee at 10. In addition, Harris testified at the post-conviction hearing that his trial counsel kept telling him during trial "We don't need no witnesses. We can beat this case; it's already beat." Tr. pp. 41-42. As the trial court noted in its findings of fact and conclusions of law, trial counsel confronted the State's witnesses (Arlisa Johnson and Mary Evanovich) with several facts adequately challenging their credibility.

Based on the foregoing, we cannot conclude that the evidence presented by Harris leads unerringly and unmistakably to a conclusion opposite that reached by the post-

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<sup>3</sup> Harris's house was located within a few blocks of Terral's.



conviction court. See Fisher, 810 N.E.2d at 679. Accordingly, we affirm the post-conviction court's denial of Harris's petition for post-conviction relief.

Affirmed.

KIRSCH, C. J., and SHARPNACK, J., concur.